EXHIBIT D

THE HONORABLE CATHERINE SHAFFER
Noted: Friday, February 12, 2010, 2:00 p.m.
(With Oral Argument)

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WINNIE CHAN, et al.,

Plaintiffs,

v.

CITY OF SEATTLE, et al.,

Defendants.

No. 09-2-39574-8 SEA

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The law could not be clearer: "The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state[.]" RCW 9.41.290. In attempting to evade this plain mandate, the City misconstrues the relevant law, draws distinctions that make no difference, raises questionable policy arguments that are better left for the legislature, and makes baseless and irrelevant claims in order to call the veracity and motives of the individual plaintiffs into question. Take away the red herrings and what remains are three simple legal arguments, none of which has any merit.[1]

1. The City's right to manage its property does not apply where there is state preemption.

The City obviously has the general power to issue rules to manage its property, but that power does not overcome the principle of preemption or make the Firearms Rule legal. Not one of the cases cited by the City (Opp. at 5-6) involves a city's attempt to regulate the use of its property in a way that was preempted by state law; indeed, none of the City's cases even mentions the word preemption. *See State ex rel. Tubbs v. City of Spokane*, 53 Wn.2d 35, 39 (1958) (city could not be compelled to rent stadium to hockey promoters because "[a]mong a proprietor's elementary rights, **in the absence of any legislative or contractual prohibition**, is the right to rent his property or not, as he chooses") (emphasis added); *State v. Morgan*, 78 Wn. App. 208, 211 (1995) (no probable cause for trespass arrest); *State v. Blair*, 65 Wn. App. 64, 67-68 (1992) (city could restrict access to city-owned housing where housing is not for the general public).

Second, the Supreme Court case on which the City appears to implicitly rely does not support the City's position. In *Pac. N.W. Shooting Park Ass'n v. City of Sequim* ("*Sequim*"), the Court stated – in *dicta* – that preemption does not prohibit the city from imposing contractual conditions on the sale of firearms on city property in order to protect its property interests, as long

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[1] The City's purported cross-motion for summary judgment, filed in conjunction with its opposition, was not properly noted or scheduled in accordance with court rules. *See* CR 56(c); KCLCR 7(b)(5)(A). Therefore, if the City attempts to file a reply brief, the plaintiffs will move to strike.

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as those conditions relate to the private use of city property. 158 Wn.2d 342, 357 (2006). "**The critical point is that the conditions the city imposed related to a permit for private use of its property. They were not laws or regulations of application to the general public.**" *Id.* (emphasis added). In contrast, the Firearms Rule is a regulation that applies across-the-board to the public use of City property. It is therefore a regulation of application to the general public – as opposed to a contractual condition imposed on private party gun sales on city property – and the City's role as a property owner cannot be used as a blanket exception to preemption.[2] *Id.* Indeed, Attorney General Rob McKenna reached the same conclusion.[3] Fogg Decl., Ex. E at 4 (while private citizens are not preempted from prohibiting firearms on their property, "a city is not in the same position as a private citizen. Large parts of city property are generally open to the public").

2. The Preemption Clause does not exclude "rules" or "policies" from its reach.

The City's argument that the Firearms Rule is not preempted because the Preemption Clause applies only to "laws and ordinances" rather than "rules" or "policies" (Opp. at 7-9) was considered and rejected by McKenna, who concluded that "the manner in which the prohibition might be imposed" is inconsequential to the preemption analysis.[4] Fogg Decl., Ex. E at 5 n.2. The first sentence of the Preemption Clause is dispositive: "The state of Washington hereby **fully occupies and preempts the entire field of firearms regulation within the boundaries of the**

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[2] Rather than addressing head-on the clear holding of *Sequim*, the City appears to re-interpret the case as standing for the proposition that a regulation must be of "general application throughout the entire city" to be preempted. Opp. at 2, 11 n.4. There is no legal basis for this interpretation.

[3] The City dismisses McKenna's Opinion as a non-binding opinion of an elected official. Opp. at 3, 10-11. In doing so, it ignores the clear rule that Attorney General Opinions are persuasive and entitled to great weight by this Court. *See, e.g., Branson v. Port of Seattle*, 152 Wn.2d 862, 884-85 (2004); *Thurston County v. City of Olympia*, 151 Wn.2d 171, 177 (2004). Here, McKenna's Opinion provides a thorough review and analysis of the law and should be carefully considered.

[4] The Supreme Court also declined to follow this reasoning on two previous occasions. *See Sequim*, 158 Wn.2d at 353-57 (city argued that preemption applied only to formal laws and ordinances; Court declined to so hold and decided the case on alternate grounds); *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 800-01 (1991) (city invited the Court to hold that only formal laws and ordinances were preempted but Court declined and instead explained that the "laws and ordinances" language refers to "laws of application to the general public, not internal rules for employee conduct").

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state[.]" RCW 9.41.290 (emphasis added). This unequivocal expression of preemption applies to "the **entire field** of firearms regulation[,]" not just laws and ordinances. The second sentence, on which the City relies, enables municipalities to enact a very narrow range of firearms regulation **despite** state preemption – it does not, conversely, reduce the scope of the state's preemption by allowing municipalities to adopt rules or policies.

If this Court were to read the Preemption Clause as the City urges, it would permit a municipality to regulate firearms to its heart's content as long as it did so under the guise of a "rule" or "policy." This cannot be what the legislature intended, as such an interpretation would render the Clause's first sentence completely meaningless. *See City of Seattle v. Winebrenner*, 167 Wn.2d 451, 464 (2009) (a court cannot interpret a statute in such a way that would render portions of its language meaningless). In fact, the Clause's history makes abundantly clear the legislature's determination to keep the universe of firearms regulation within its exclusive reach. The legislature first attempted to preempt firearms regulation in 1983. *See* Laws of 1983, ch. 232, § 12. Because the legislature did not explicitly express its intent to preempt the entire field of firearms regulation, the statute was deemed as preempting only **inconsistent** local firearm laws. *See id.*; *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 588 n.3 (1983). To solve this problem, the legislature amended the statute in 1985, and again in 1994, adding the words "fully occupies and preempts the entire field[.]" *See* Laws of 1985, ch. 428, § 1; Laws of 1994, 1st Sp. Sess., ch. 7, § 428. Both the 1985 and 1994 legislation followed court decisions limiting the preemptive effect of RCW 9.41.290 and 9.41.300. In other words, when courts limited the Clause's preemptive reach, the legislature responded by amending the statute with stronger preemption language. To interpret the Preemption Clause as the City now urges would be to completely ignore clear legislative directives to the contrary.[5]

[5] This Court should not be distracted by the City's citation to other preemption statutes. Opp. at 8. Those statutes do not contain pronouncements of state preemption nearly as broad and sweeping as the

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3. The Firearms Rule *does* include criminal penalties.

The City's argument that the Firearms Rule is not a criminal regulation (Opp. at 9) is, quite simply, wrong. The sanction for refusing to leave a parks facility is citation or arrest for **criminal trespass**. Fogg Decl., Ex. C at 1; Malouf Decl., Ex. A. In fact, City officials have informed Parks Department employees that, in enforcing the Rule, they should call the police if the person refuses to leave. Malouf Decl., Exs. B & C. This certainly constitutes "criminal firearms regulation" falling within the preemption statute's reach. *See Cherry*, 116 Wn.2d at 801 (preemption seeks to "advance uniformity in criminal firearms regulation").[6] The Attorney General agrees. *See* Fogg Decl., Ex. E at 6 ("Allowing a city to use criminal trespass to enforce a ban on firearms allows conflicting criminal codes regulating the general public's possession of firearms").[7]

4. An injunction is appropriate and necessary to enforce declaratory relief.

"[T]he combining of declaratory and coercive relief is proper and even common" where, as here, a municipality is engaging in abusive practices that violate state law. *See Ronken v. Bd. of County Comm'rs of Snohomish County*, 89 Wn.2d 304, 311-12 (1977); *see also* RCW 7.24.080. Yet in arguing against injunctive relief, the City not only raises irrelevant and inaccurate accusations against the individual plaintiffs, it also applies an incorrect standard. *See Wash. Fed'n*

Preemption Clause at issue here. Moreover, language used in one statute has no bearing on the interpretation of language used in unrelated statutes. *See, e.g., HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 454 (2009); *Int'l Ass'n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 39-40 (2002). In any event, the statutes cited by the City involve areas of law heavily regulated by various agencies and therefore inclusion of the term "rule" was more obviously necessary. *See* RCW 80.50.110 (regarding selection and utilization of energy facility sites and environmental impacts resulting from such sites); RCW 9.94A.8445(1) (regarding residency restrictions for sex offenders and referring in part to "local agencies"); RCW 19.190.110 (regarding the regulation of commercial e-mail and referring in part to "local agenc[ies]"); RCW 46.61.667(5) (regarding traffic laws, specifically regulation of use of cell phones while driving).

[6] *Cherry* does not save the Firearms Rule from state preemption. 116 Wn.2d at 801-02 (Preemption Clause does not "prohibit reasonable work rules regarding possession of weapons in the public workplace" because it preempts "laws of application to the general public, not internal rules for employee conduct").

[7] It is unclear whether the policy challenged in *Estes v. Vashon Maury Island Fire Prot. Dist. No. 13* included criminal trespass as its enforcement mechanism. *See* Keenan Decl., Ex. B. In any event, there is certainly a substantial difference between regulating firearms in parks versus fire stations, as the latter were not created for the purpose of providing recreational and gathering opportunities to the public.

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of State Employees v. State, 99 Wn.2d 878, 887-88 (1983) (injunction is appropriate where plaintiff has clear legal or equitable right and well-grounded fear of immediate invasion of that right, and where act complained of is resulting, or will result, in actual and substantial injury). Here, the individual plaintiffs have the clear legal right to carry a firearm anywhere the state has not expressly prohibited.[8] *See* RCW 9.41.290. Further, the individual plaintiffs have obvious reason to fear the immediate invasion of that right, as the City has already posted firearms-banning signage. Friedli Decl. at ¶ 4. Finally, most of the individual plaintiffs have been told by parks officials that they may not enter parks premises. *See* Motion at 7-10, 17. The City's exaggerated argument that the plaintiffs' injuries are disingenuous not only thoroughly mischaracterizes their testimony but also misses the point: these law-abiding citizens should be free to use public recreation facilities without having to carefully tip-toe to avoid areas with posted signage.

The City's policy arguments are inappropriate in these proceedings and should have no bearing.[9] Such arguments are better directed toward the state legislature, which is the only body that can control this issue. *See, e.g., Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 64 (2003) ("Courts do not have the authority to legislate, only to construe existing law"). Not only does that explain Mayor Nickels' statement to Representative Chopp that his "hands are tied" at the local level, *see* Nickels Decl. at ¶¶ 4 & 6, but it also explains why Seattle City Councilmember Richard McIver stated, in an e-mail to the Alki Community Council, "While I would support a gun ban in city parks, I think you really need to direct your lobbying to members of the State Legislature who do have the power to address this issue." Malouf Decl., Ex. E at 2.

For the reasons stated above, plaintiffs' motion for summary judgment should be granted.

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[8] The City's argument that the Preemption Clause does not confer a private right of action is nonsensical: if that were the case, no one would ever be able to challenge a firearms regulation that violates preemption – a result that clearly runs contrary to the case law.

[9] For obvious reasons, the City omitted the fact that an overwhelming majority (**96%**) of the people commenting on the proposed gun ban **opposed** such a ban. Malouf Decl., Ex. D.

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DATED this 8th day of February, 2010.

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EXHIBIT E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

WINNIE CHAN, et al.,	)	
	)	
Plaintiffs,	)	KING COUNTY CAUSE
	)	No. 09-2-39574-8 SEA
vs.	)	
	)	
CITY OF SEATTLE, et al.,	)	
	)	
Defendants.	)	ORIGINAL

REPORTER'S EXPEDITED VERBATIM REPORT OF PROCEEDINGS

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FRIDAY, FEBRUARY 12, 2010

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Heard before the Honorable Catherine Shaffer, at King County Courthouse, 516 Third Avenue, Department 11, Seattle, Washington.

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A P P E A R A N C E S:

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STEVEN W. FOGG and MOLLY A. MALOUF, Attorneys at Law, appearing on behalf of the Plaintiffs;

DANIEL DUNNE and DAVID KEENAN, Attorneys at Law, appearing on behalf of the Defendants.

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SEATTLE, WASHINGTON

FRIDAY, FEBRUARY 12, 2010

AFTERNOON SESSION - 2 P.M.

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THE COURT: Be seated. Good afternoon, everybody.

I want to tell everybody that I have had the chance to review all of your pleadings and all the cases cited, and I have copies of the cases that you relied on here on the bench. I also have the section of the Revised Code of Washington that we have been discussing here, as well as the other statutes.

I do not know if it is Mr. Fogg or Ms. Malouf. Mr. Fogg's arguing? Okay. 15 minutes to argue. Tell me up front how much time you are reserving for rebuttal, if you would. And 15 minutes to respond.

And who is arguing for the City?

MR. DUNNE: I am, Your Honor, Dan Dunne.

THE COURT: Thank you. Go right ahead, Mr. Fogg.

MR. FOGG: Good afternoon, Your Honor. Steve Fogg on behalf of the plaintiffs in this case. I'd like to reserve, say, three minutes.

THE COURT: And before we get you started, I

see somebody cupping their ear.

Do you need a hearing device, sir?

AUDIENCE MEMBER: If possible, please.

THE COURT: Sure.

AUDIENCE MEMBER: Thank you, Your Honor.

THE COURT: If everybody doesn't mind waiting for a minute, we will just have my bailiff run downstairs to the interpreter's office and grab a hearing device, and as soon as we are set up, I will come back on the bench.

MR. FOGG: Sure.

THE COURT: All right. Thanks, everyone.

(Pause in proceedings.)

THE COURT: Be seated, everybody. Thanks for waiting, everyone.

I am sorry, Mr. Fogg, I cut you off when you were telling me you wanted to reserve three minutes.

MR. FOGG: That's all right, Your Honor.

THE COURT: Go ahead.

MR. FOGG: Thanks.

Your Honor, we're here on behalf of the plaintiffs. We're asking that you grant our motion for summary judgment.

There's three basic reasons I think our argument distills and the three reasons why you should

do so.

First, the firearms rule that's been passed by the City violates the clear statutory language of preemption found in the statute that I know you're familiar with, 9.41.290.

Second, it violates the clear and comprehensive scheme -- regulatory scheme that's been enacted by the Legislature in both 290 and 300.

And, third, it clearly violates the purpose of this preemption statute, which is to promote uniformity amongst the state firearms laws.

I want to start with the language itself because I think it's -- I don't want to belabor it. But it's unmistakably clear from reading the language that the Legislature owns and occupies the field of firearms regulation. It literally could not be more clear. It states that they fully -- the state fully occupies and preempts the entire field of firearms regulation.

Now, that's a very clear statement of intent, and I know this court knows from other cases, this isn't the sort of case where you have to divine the intent or you have to -- or it's sort of murky, you know, that you have to infer whether or not the Legislature intended to preemption.

Here, they've made it clear, not just in the language, which could not be more clear, but in the -- if you look at the legislative history, which we've tried to give you a sense of, every time somebody has said, are you really sure that you guys meant that you preempt the field. Isn't it possible that the City has some power? Every time there's been an attack on the scope of that preemption language, it has been amended and made stronger.

So I think that you take that together, you look at the Lenci case which says if the Legislature affirmatively expresses its intent to occupy the field, there is no room for doubt. That's Lenci at 63 Wn.2d 664. That's a 1964 case. There is no room for doubt here, and, for that reason alone, based on the language, preemption applies and supports our argument for summary judgment.

The second reason that you should grant it is it's not just a matter of intent. If you look at the scheme that's been affected here, we have in 290, the preemption statute, and so the default position is that the City -- or that the state occupies the field. And then in 300, we have some very carefully delineated exceptions where the state has -- and, again, this was an amendment so this was after there had been some

question in the case law. This is an amendment to make it very clear that, look, cities, you can only regulate in these very limited exceptions. And none of it -- it's uncontested here that none of the exceptions that are listed in 300 apply to parks, that the City is not arguing that the scheme gives them the right to do this.

What's interesting about 9.41.300 is, if you look at the exceptions, how the great pains that the Legislature took to protect public space, even when granting cities the power to prohibit or ban firearms. So, for instance, if you look at 9.41.300(b), we're in a place, a courtroom, where a municipality can ban firearms. But, what I found interesting is if you look, they say, but, you know, you can't do it -- you, the City, can't prohibit firearms possession in "common areas of ingress and egress." They say things like, the restricted areas shall be the minimum necessary to fulfill the objective. You have this great effort underway to protect public space as much as possible while, at the same time, giving the City the right to ban firearms in some very limited exceptions.

If you were to credit the City's argument, the City's argument sort of turns that on its head and says, oh, you know, we can't -- that the Legislature

would have been fine with us regulating firearms in vast amounts of public space. I mean, I don't know what the percentage of parks and playgrounds are, but it's a huge amount of public space. That doesn't make sense. It violates the scheme, and, surely, if that was the legislative intent, then, in 9.41.300, the City would have been given explicit permission to act in that fashion.

THE COURT: Can the City really do any banning in courthouses under this language, or is this state regulation? I ask because the section dealing with powers of cities, towns, counties, and so forth under 300 seems to be under section 2 versus (1)(b).

MR. FOGG: I think it is -- if you looked at the -- I think it was the -- this language came out in response to the Ballsmider case where that was sort of the issue was, does -- was the -- was the state sort of stepping back and allowing the City to do whatever it wanted in that context or was it still an exercise of state authority. And I think Ballsmider -- or the Legislature, in passing the amendment, made it very clear that, no, this is -- you're still acting under state authority, that we're not seeing the right even there.

The third reason that I think that our motion

should be granted, in addition to the language, in addition to the scheme, is that the whole point of preemption is to promote uniformity of firearms regulation. It makes sense for the public to know that the laws aren't going to change from county to county or from jurisdiction to jurisdiction.

This firearms rule doesn't just -- it doesn't promote uniformity. It actually makes things worse because now the patchwork quilt problem that this is intended to solve, you've got many more pieces in the patchwork. Now, a lawful gun owner doesn't just have to worry about, hmm, is the law going to change between Seattle and Tacoma. They have to worry about within a park, is it going to change from playground to playground, literally from acre to acre as opposed to county by county. That is another reason why it doesn't make sense.

The City acknowledges the statute. I mean they have to, and they acknowledge that the preemption statute covers firearm regulation. They seek to evade it by employing what I would call sort of a naming game. They say, well, sure, we can't regulate firearms, but this isn't a regulation. This is a rule, and rules are different. Rules -- the point's made clear in their opposition. They say in their

introduction, "The rule is not a regulation of firearms because it is not generally applicable to all conduct throughout the City's jurisdiction, and it does not impose penalties for violations."

And, I'm going to urge you to pay attention not to what they call this piece of regulation but what it actually does. And, in fact, it does apply. It's generally applicable the all conduct throughout the -- throughout the City. If you want to use a park -- if you're a citizen and you want to use a park, this law applies to you. It does -- so it's very different, by the way, from the Cherry case where that applied only -- obviously that's not the general public. That's only if you happen to be a city employee.

The rule does impose a penalty. They say, well, we're not prosecuting anybody for possession of a firearm in the city. Well, they are. The fact is that if you lawfully have a firearm in the park and you don't leave, you will be arrested and you will be prosecuted for criminal trespass. And, so, saying that there's to penalty, that's sort of like saying, well, there's no penalty for robbery as long you don't commit robbery. True, but, the fact is if you commit the robbery, you're going to be prosecuted. And, here, if you carry -- if you carry a gun in the park, you will

be prosecuted for criminal trespass.

So, I would urge the court not to, as I'm sure it has to do routinely, not to look at the labels that lawyers place but what the actual conduct is here. And what we have here, pure and simple, is firearm regulation.

I think you can also take some notice of the City's conduct in the fact that what they're doing here is a rather -- is sweeping and seeking to prohibit guns throughout these vast areas of property is sweeping, and, yet, it's been a fact of life. Preemption has been a fact of life for the last 50 years, and I think it's fair to say the City has never liked it, but I think they've all realized that there's not much that can be done about it, which is why we submitted to you Mayor Nickels' quote that, you know, our hands are tied, and we're unable to adopt any local laws to protect our residents from gun crime.

What is this rule other than a law designed, in their view, to protect residents from gun crime? He says, "I certainly understood that the statute preempted the City of Seattle from passing ordinances that would generally regulate firearms throughout the City of Seattle subject to possible criminal penalties. That's exactly what this rule does. It generally

regulates firearms throughout the city and those who violate the rule will be subject to criminal penalties.

The fact -- if it was really so obvious, if it was really so evident that the Legislature said, sure, cities, you know, you can ban -- that you can ban guns in the cities to your hearts content, it surely would have happened before now. I think what we are seeing here, the fact that it's only happening now, is some evidence that they knew good and well that the preemption statute prohibited this statute. Not only did the City understand that, the attorney general understands that.

Now, we're not saying that the attorney general opinion is dispositive precedent. It's not. But neither is that a reason to discard it and to pay no attention to it. If you look at the case law, Thurston County versus City of Olympia, that's 151 Wn.2d 171, that it encourages trial courts to give "Great weight to the attorney general in matters of statutory interpretation." It's a well-reasoned opinion. It's, of course -- you know, I would say that, but it's a long opinion. It's exhaustive. And I think more to the point, it's objective. You know, you have to assume that you're getting briefs from lawyers who have a client, who have a point of view. The

attorney generally really doesn't have a dog in this hunt, and the fact that they've examined this and came down so conclusively on this side of preemption is something that you should -- we would urge you to give some weight to.

I want to finish up by just talking a little bit about what I think the two key cases, Cherry and Sequim. At least they seem like they're the key cases to me only because they explicitly address the statute.

THE COURT: I don't think you need to spend a lot of time on Cherry. I would like to hear you talk about Sequim.

MR. FOGG: Well, Sequim, I would just go back to what they say the critical point is, which is, the conditions that City imposed related to a permit for private use of its property. They were not laws or regulations applicable to the general public.

What we have here is a regulation that is applicable to the general public. It's completely different from a permit that's given to somebody for the private use of the property. This is public use of the property, and the City cannot hide behind its role as a landowner in that -- in that situation.

I think what we have here, Your Honor, just to sort of sum up, is that we're asking -- what we're

asking you to do is to --

THE COURT: Do you think that the Legislature's statements in 9.41.300(3)(b) --

MR. FOGG: So 9.41.300, and then what was it?

THE COURT: 300(3)(b) and (3)(a).

Do you think those two provisions are a response by the Legislature to the Sequim decision?

MR. FOGG: (Reviewing.) Well, I'm going to do something I hate to do and admit that I don't know because I don't know when these were added. But I do think that it is evidence, again, of the Legislature responding that, look, no, we really have control over this area, and every time there -- you know, there is any sort of sense that, no, actually maybe you didn't mean to take control over this area, they say, no, we really meant it when we said we possess and control the entire field of firearms regulation. In short, we do think it's as simple as the Legislature has said it repeatedly, we are in a system where the state has authority over the City. And the fact that the City has not been able to achieve what it thinks is the right thing in Olympia is no reason for it to be able to employ what's clearly a firearm regulation and to call it a rule and hope for the last.

So I'll reserve any remaining time I have.

THE COURT: I have one last question before you go, Mr. Fogg.

You are making any argument under the second amendment?

MR. FOGG: None.

THE COURT: Okay. Why not?

MR. FOGG: I don't think it's necessary.

THE COURT: Okay. Thank you.

MR. FOGG: Thank you.

THE COURT: Let me hear from you in the response. Go right ahead, Mr. Dunne.

MR. DUNNE: Thank you, Your Honor. Dan Dunne on behalf of the defendants, City of Seattle, the mayor, and the superintendent.

Let me start by addressing your last -- next to last question -- well, your last two questions. The Second Amendment provides no right outside of the home. That right is very limited --

THE COURT: It's hard to read Judge Scalia's decision that way. He does talk about the right to keep arms as being related to right to have them in the home, but the right to bear arms seems to be related to the right to transport them.

MR. DUNNE: The only holding of that case is that the City may not restrict a person's ability to

have operable firearms in the home. That's as far as it goes for the purpose of self-defense. It does not hold anything broader than that.

So, at this time, especially the Ninth Circuit, there is no Second Amendment right to carry firearms into public spaces. And under Ninth Circuit law, as it currently stands, the Second Amendment doesn't even apply to local state governments.

THE COURT: Under previous rulings by, among others, the U.S. Supreme Court that indicated that the right wasn't personal, but how Heller seems to say something very different about the way to construe the right and it just brushes away the past precedent that the Ninth Circuit decision relies on.

MR. DUNNE: The District of Columbia has authority by delegation of congress, and, therefore, it is an instrument of the federal government, so there is a case pending before the court currently out of Chicago that will address whether it applies to the state. But that has not been decided, and until it is, in this jurisdiction, the Ninth Circuit has decided that question and the current law is that it does not apply to states and local rules and municipalities, so that is what we are here with.

But it's not an issue because that claim

hasn't been made by the plaintiffs.

THE COURT: Okay.

MR. DUNNE: With respect to 9.41.300 in your question about subsection (3)(a), that is not a response the Sequim. The language there provides that cities, towns, and counties may enact ordinances restricting the areas with respect to jurisdictions where firearms may be sold. Sequim involved a permit for use of profit. It didn't involve an ordinance and didn't have a restriction on the general areas where firearms would be sold.

But that really gets to the heart of what we're here to talk about. The plaintiffs say over and over that the law cannot be clearer that the State of Washington fully occupies and preempts the entire field of firearms regulation. But, for the most part, they beg the question about what it means to regulate firearms, and they ignore both Sequim and Cherry in what they say.

Obviously, there is no case that they can cite either at the court of appeals level and the Supreme Court level that sustains their position with respect to the kinds of rules that we are advocating. They do refer to Ballsmider. Ballsmider was a case where the City enacted a criminal ordinance, and the

Legislature reacted to that, as they have over time, and modified RCW 9.41.290. Every time they have modified that statute, they have left in the language that refers to penalties. Every time they've modified that statute, they have left in the language that refers to laws and ordinances and have not expanded it to rules.

So the Legislature has paid a substantial amount of attention to the language in that statute, but consistent with our argument about what the interpretation should be, and I would submit completely consistent with how it's been construed by Cherry and Sequim, they have never touched the limitations on laws and ordinances.

And it's critical to realize two things about that statute. First, that statute was enacted as part of a uniform law provision. Many states across the country enacted similar statutes, and the uniform law provision was for criminal regulation of firearms. And it's in Title 9, which is a criminal code. And both Cherry and Sequim find this to be extremely significant.

Now, what the City has done is it's passed a policy. The way a City passes a policy is, it does so by enacting a rule or policy pursuant to its rights

under its charter. The City has not enacted an ordinance.

If the court looks at Title 35A, chapter 11, section 020, in that section --

THE COURT: Just a moment.

MR. DUNNE: I have a copy of that, Your Honor.

THE COURT: That's okay. We've got it here.

MR. DUNNE: In that section, it provides that the only -- the only entity of city government that can enact an ordinance with criminal penalties is the City Council. And then in the following chapter, chapter 12, where you have a council, mayor fashion of government, it tells you how the council and the mayor wants to act together.

Park superintendents cannot pass criminal rules, cannot pass criminal ordinances. They cannot enact criminal penalties or even civil penalties.

THE COURT: Hang on just one second, if you would.

MR. DUNNE: I think it's the second paragraph, if I'm not mistaken.

THE COURT: I'm almost there.

Okay. Go ahead.

MR. DUNNE: So I think Mr. Fogg tends to

minimize this, but there is a clear, real, and fundamental difference recognized in the law between how you enact a policy and what an ordinance is.

Now, we've cited at least five other statutes in which the word rule has appeared, and those appear in our brief. And the response to that from the plaintiff is, don't be distracted by these other statutes. They're all preemption statutes and they cite case law that says you can't refer to a statute for one purpose to interpret language in a different statute.

But that case law relates to statutes that are enacted for different purposes. These preemption statutes are all enacted for the same purpose. They also say, well -- well, those statutes refer to local agencies and so it's more appropriate to include a rule -- a word like rule in those statutes because they're also attempting to preempt the activities of local agencies. Well, I think that's what our parks department is, is a local agency. And they prove our point by saying that. The whole point is if they wanted to preempt rules and go beyond criminal regulation, they would -- they would include that language.

But it's completely consistent with our

interpretation and what the Supreme Court has said to omit rules because you can't have a criminal rule. And if the point is to regulate firearms in a criminal manner, you would not include rule. That would be inconsistent.

Now, I think Your Honor's probably perfectly aware of the canons of statutory construction that we have cited, but it would be inappropriate, as Cherry and Sequim have indicated, to import something into the statute that isn't there. It would be inappropriate to import the word rule in when it isn't there, especially when this statute has been amended so many times as it has.

And let me just go to what the real fundamental holdings of Cherry and Sequim are. The most fundamental holding of Cherry is this: "We hold that the Legislature in amending RCW 9.141.290 sought to eliminate a multiplicity of local laws related to firearms and to advance uniformity in criminal firearms regulation." That is the core holding of Cherry.

You will also find in Cherry that it says over and over again that there is a distinction between "laws and ordinances" and internal workplace rules, and that there is no indication in this statute that the Legislature had any intent to regulate internal

workplace rules.

THE COURT: Let me take you to the next line, Mr. Dunne.

MR. DUNNE: Okay.

THE COURT: "The laws and ordinances preempted are laws at application to the general public, not internal rules for employee conduct." So the court did not just look at the label of rule. It looked at the operation of the rule and said, well, here we have a true rule for employee conduct, not a law of application to the general public.

Can you distinguish that?

MR. DUNNE: Yes, absolutely.

So the law of general application to the public would be an ordinance because it would apply to property that is owned by others, not just by the City. A rule can only apply to property owned by the City.

THE COURT: So if you pass a rule that applies to the general public, you are going to have a problem?

MR. DUNNE: You can't. You cannot pass a rule that applies penalties to the general public. You must do that by ordinance. That's the whole point.

THE COURT: Okay.

MR. DUNNE: Additionally, what would regulate

general public is an ordinance that tells people, generally, where they can and they can't engage in a particular activity throughout the entire jurisdiction of the City. And perhaps the best analogy for this, Your Honor, would be smoking. There was a time in this state when individual establishments had policies that when you walked into their restaurant or their building, you could not smoke. And if you violated that or didn't comply, you would be asked to leave. And if you did not leave, then you would be subjected to possible criminal trespass.

That doesn't mean that the act of smoking is criminalized because, obviously, private property owners can't criminalize anybody's behavior. What that means is you're permission to enter their premises was revoked, which they had every right to do, and Sequim says that the City has every right that private property owners have.

So when you revoke that and they still don't leave, it isn't the smoking that is criminalized or are regulated, it is the act of refusing to leave when the property owner has asked you to leave. That gives rise to trespass.

That is the most fundamental distinction. And there is no explanation for that distinction that's

provided by the plaintiffs. I would submit that the plaintiffs' argument really plays more word games than the court should count on this because there is a fundamental difference between criminalizing the act and criminalizing someone who trespasses because they haven't left property.

There's no viol -- there's no citation for carrying a firearm. There's no criminal penalty for carrying a firearm, none of that actually comes to pass. You get the opportunity to leave, and, if you don't leave, then you are in violation of whether you have permission to be on the premises. You are not in violation of some firearm regulation.

So, that a critical distinction.

If we go to the Sequim decision --

THE COURT: I'm there.

MR. DUNNE: Two critical passages from Sequim both in paragraph 32, the next to last paragraph.

THE COURT: Which page?

MR. DUNNE: It's the last -- just about the last page, Your Honor. So, page 11 in the WestLaw printout, the last paragraph before Conclusion.

THE COURT: I'm they're. And you are on page 357, 1483 by the way.

MR. DUNNE: Okay. And the court says,

"Applying our reasoning in Cherry it follows that a municipal property owner, like a private property owner, may impose conditions related to firearms for the use of its property in order to protect its interest."

THE COURT: "It's property test."

MR. DUNNE: Yes. And that is --

THE COURT: Not its interest, its property interest.

MR. DUNNE: (Reviewing.) Correct. I'm sorry, Your Honor. And that is exactly what the City is doing.

Now, the Seattle Municipal Code delegates to the superintendent certain rights and responsibilities. It delegates to the superintendent the responsibility to manage and control the park and recreation system. It also delegates generally all responsibilities for the management and control of the park and recreation system.

As proprietor, they have responsibilities. And these are in the State ex rel. Tubbs versus City of Spokane case, which says that "When a City acts in its proprietary capacity, it has the same duties, obligations, and responsibilities, and also the same rights and powers as other like proprietors."

THE COURT: Do you want to take me to that page? I have that case here, too.

MR. DUNNE: That is quoted in our brief, and that is page 39 of the Washington Reporter.

THE COURT: Okay. Go right ahead.

MR. DUNNE: So that really gets us to the fundamental distinction. The City has two hats that it can wear. It can wear a hat where the Legislature has conferred upon it police powers, and with police powers, it can engage in regulation, and that regulates all activity that occurs in the city on anybody's property by anybody under any circumstances. So that's a police power. You know, you put your police hat on.

That's one way the City can act. And to do that, it must act by ordinance. And that's a -- you know, there are democratic safeguards because you have to have the majority of council members. You have to have the mayor.

On the other hand, it can act in its proprietary capacity. And what we have seen with Sequim is Sequim says when you act in that capacity, regulating your own property, you have acted in a way like any private property owner and you have the same rights that that private property owner does.

So, what Sequim says in that same paragraph

is, "For the same reason that a municipal property employer may enact policies regarding possession of firearms in the workplace. Because a private employer may do so, a municipal property owner should be allowed to impose conditions related to sales of firearms on its property if a private property owner may impose them."

Your Honor, I would submit that that is as clear a holding of the Supreme Court as one could find, and it applies here as clearly as one could apply it, and there would be no question about that application.

I see my time is up.

THE COURT: It is. I am going to let you go ahead and finish up.

MR. DUNNE: One last thing I would say about Attorney General McKenna's opinion. I don't agree that it's objective. I think it's naive to suggest that it is. You know, there is partizan political office. That's what the Attorney General Office is. And that's why Supreme Court decision after Supreme Court decision has said that we give little deference to attorney general opinions on matters of statutory construction.

I've provided this to counsel at noon today. I'd like to hand up to Your Honor the four Washington Supreme Court cases, which all hold that we should give

little deference to attorney general opinions among statutory construction.

So with that, Your Honor, I guess I would close by saying, unless the court has additional questions, that this is not an ordinance but a rule. It's not a criminal regulation but a property owner's policy. It doesn't have criminal consequences for people who do not comply. Those consequences come from the act of not removing a person from the premises.

The City's properties get used by almost 2 million people a year. There are 59,000 youth events a year scheduled on the City properties, and those involve people under the age of 21 who are not permitted by law to carries guns.

Those children and youths deserve an environment for recreation and education and that is safe and secure, and, fortunately, when they go to City-owned property for these sorts of functions, the Supreme Court has said that, as the proprietor of these properties, the City can enact sensible rules that allow them to have a safe and secure environment.

I would ask that the court allow the City to sustain its role, to find it lawful, and to enter summary judgment on behalf of the City and the defendants, because we have cross-moved for summary

judgment.

THE COURT: Thank you, Mr. Dunne.

MR. DUNNE: Thank you.

THE COURT: Mr. Fogg, go right ahead.

MR. FOGG: Thank you, Your Honor.

Your Honor, what you just heard and what I would call the sort of closing paragraph of his remarks are policy arguments. Those are policy arguments that should be brought to the Legislature, and it is exactly, you know, that sort of frustration that's driving what the City has done here. The bottom line here, the facts that I think are undeniable is that this rule does impose a criminal penalty and that this rule is applicable to the general public.

Those are the key points, and no matter how they can sort of slice those up, those facts remain incontestable. The attorney general considered this argument, and I think it's response is valid, which is the argument that, well, you're not being prosecuted for possessing the firearm, you're being prosecuted because you wouldn't leave the park for possessing the firearm, and what they said is it makes little difference to a person who's being prosecuted whether they're being prosecuted for criminal trespass or for the possessing the firearm. The fact is they're being

punished -- that there is a punishment, a criminal punishment that's being imposed for violating the ban, and that violates the preemption statute.

With respect to a law that applies to the general public, whenever the City discusses Sequim, they always skip the last two sentences in the holding paragraph which says, "The critical point is that the conditions the City imposed related to a permit for private use of its property, they were not laws or regulations of application to the general public." What we have here, of course, is a regulation that is applicable to every person in the City of Seattle.

And how I would urge you to make sense of Cherry and Sequim is, those are cases in which you have a subset of people to whom the regulation applies. A person can choose to be a city employee, and if you make that choice, then you're susceptible to workplace rules just as you would be in a private setting. You can choose to go to -- and in the Sequim's case, say, a gun show on private property. That is very different from what we're talking about here, which is a rule that is applied across the board to anybody who wants to recreate in a city park. So the key difference there is the scope of the regulation. It's not a matter of what hat that the City is wearing. I mean,

if you like at their -- they have get to address the fact that their ban is a complete variance with the scheme found in 300.

Of course, the City or the county owns the courthouse, and, yet, the statute's not silent on that. The state says here are the ways that you can. They don't say put on your property hat and you can regulate to your hearts content. They say, no, here are the rules that are going to apply to that. Because this is a regulation that imposes a criminal penalty, because it's applicable to the general public, it runs afoul of the preemption statute, and you should find for us.

To just kind of mop up points counsel and I -- I appreciate the courtesy, he let me know last night that he was going to be referring to the RCW 35 and that there's the Housing Authority case, 120 Wn.App. 839, that makes the commonsense point, which is, the City's power, notwithstanding RCW 35, a City's power is still subject to the laws of the state and they can't do anything that is -- to take any action that would be prohibited by law, which is, of course, our argument here.

With respect to, I guess, the final point, they make much of, well, there are other statutes that mention rules by name. It hasn't happened here.

Shouldn't that be something that you should consider. If you look at those statutes that they've cited, they're all recent. They're all in the last several years. And I think there's something to the language kind of changes over time, the language that you find in our statute is very much of the type of language you would find in the '80s and '90s. But perhaps more importantly, none of those statutes have the incredibly broad sort of sweeping statement that you have at the front of our statute that says we fully occupy the field of firearms regulation. That's not there. And there's more of a gap-filling function that's performed by the statutes that are relied upon by the City.

Also, I think the Legislature, frankly, would not imagine that a rule could be used in this fashion. I think they probably thought we covered the landscape pretty well. We've repeatedly said, you know, we occupy the field, don't do it, the laws -- and I don't think that they would have thought that, well, we can dress up a rule to have a criminal affect and somehow that will avoid the statute.

THE COURT: One last question, Mr. Fogg.

MR. FOGG: Sure.

THE COURT: Do you want to comment on the four cited Supreme Court cases saying we don't pay much

attention to the attorney general?

MR. FOGG: Yes. If I can get my notes.

The case that -- I mean, I don't want to make too much of it because I think, you know, the court understands, it's something you should pay attention to, but it's not something that you absolutely have to follow. But I would direct you to Thurston County versus City of Olympia, 151 Wn.2d 171. I cite that to the court because that was an attorney general opinion about a matter of statutory interpretation. And, there, you have the Supreme Court saying we give that great weight, so I think that you should do the same here.

THE COURT: Thank you.

MR. FOGG: Thank you, Your Honor.

THE COURT: All right. Let me see if I can back up with regard to the background of what's before me factually and then talk about some of the general legal principles that seem to be in play here, and then I will close in on the arguments presented by the parties here.

I do you want to say preliminarily that it was a pleasure to read the briefing here and to hear the argument today. It is always a treat for the court to get such well-argued briefs and such excellent oral

presentation, and I appreciate the ability of counsel to turn on a dime and answer the court's unexpected questions, too.

Let me turn to the background here. I know the City has argued to me, both at argument and in the briefing, that the purpose of this rule is to protect children and youth in the city parks, and the City has argued to me that the rule is drafted so that it only covers park department facilities where children and youth are likely to be present, and the City has argued to me that appropriate signage has to be up to communicate that firearms aren't permitted at these locations.

One thing I do not see in these materials is any indication of the reason why the City felt prompted to protect children and youth at these particular city facilities. If the court is always interested to see that kind of factual showing when a policy argument is being made to explain a rule to me, the only background I am aware of for this particular rule is from my general newspaper reading as a member of the informed public. And I think we all know that nothing that's been reported in the papers preceding this rule has much to do with protecting children or youth, and I don't think there's in Mayor Nickels' communications

that have been given to me that cover this issue either. So I am not sure exactly why it is that this rule is in place, although I see what the City is telling me is the reason that it is in place.

The second thing I want to note here is that the facts that are presented to me with regard to what the plaintiffs are reporting, and none of their accounts are rebutted here, is that this rule has not been applied to them solely at areas where children and youth are likely to be present. It's been applied to them at the city parks that they have gone to, nor has the rule been limited to places where signage has been put in place.

This policy or rule or whatever we may call it has been applied to them whether or not signs were up and whether or not they were in an area where children or youth were likely to be present.

So I have an unusual situation where the rule is challenged but the application seems to be broader than the language of the rule and broader than the policy that is advanced to me to protect the rule.

That is the factual background.

Each of the plaintiffs here, and I think it is fair to say that they are very different human beings, has reported that, generally with advanced

notice, they had gone with a lawfully-owned firearm to a location that is a public park and that they have been -- trust us at times by asking for written evidence, and at times by people consulting with superiors via phone, but one way or another, they have been told that they may not be on the premises with their lawfully-possessed firearms.

Let me back up to the legal background here. I think we all know this is an interesting time for this rule to be in place for a couple of reasons. One is because of the background with regard to application of laws and regulations to firearms in Washington state under the Washington state statute and Washington state case law, and I will talk about that in more detail in a bit, but, also, because I think we are all keenly aware, for all that the plaintiffs is not advancing it to me, but there is a recent decision out of the U.S. Supreme Court which is very different from anything the U.S. Supreme Court had said in the past and which, in this court's view, throws into doubt a good deal of prior federal case law, including some of the case law cited to me on this motion.

The background here, and, again, it is not the main focus of the court's ruling, but I also do not feel comfortable dealing with this case and not

addressing it is that, unlike other kinds of regulations, topics that the court deals with in this case, there is no question at all that we are dealing with constitutional rights. There is the basic right under the Washington State Constitution Article I, Section 24 that "The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."

That is a clear statement of an individual right under the Washington State Constitution. The scope of that right is not crystal clear at this point nor was it briefed here, but certainly it is in play in the background to this motion.

The other major constitutional provision that I think we are all more alert to in the wake of the recent U.S. Supreme Court case is the Second Amendment of the U.S. Constitution which says that "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

And the reason I raise that is background, and I am going to move off this constitutional topic in a moment, is because of the decision by the U.S.

Supreme Court in June of 2008 in District of Columbia versus Heller, in which Justice Scalia for the majority spent a great deal of time in his opinion examining the meaning of this amendment and settled an argument that's been ongoing for a long, long time about whether or not the Second Amendment right is a right that pertains to the ability to organize a militia, such as the National Guard, or whether it is a right that expresses an individual right of individual citizens of these United States.

According to the Supreme Court, the right to keep and bear arms is, in fact, an individual right. I agree with the City that this decision doesn't expressly apply that right via the Fourteenth Amendment to the state's, and I will point out that it is not an unlimited right either, according to the express language of the decision.

Justice Scalia says that, among other things, that nothing in his decision casts doubt on long-standing prohibitions of firearms by felons and the mentally ill, laws forbidding the carrying firearms in sensitive places such as schools and government buildings, for laws imposing conditions and qualifications on the commercial sales of arms. And, in addition, the court says that the Second Amendment

is limited to the ability to carry the sorts of weapons in common use, and he seems to think that that is handguns as opposed to "dangerous and unusual weapons."

So that decision is out there, too, and I am throwing it out there because the court always has to be respectful when I know that I am dealing with a recognized constitutional right which exists both at the state and the federal level.

Against that background, let me turn to Washington state law and the critical provisions that we are dealing with in this case.

The first provision I want to talk about is the critical state preemption issue that is before us today, and that is the Legislature's statement in RCW 9.41.290. "The State of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms or any other element relating to firearms or parts thereof including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law as in RCW 9.41.300

and are consistent with this chapter."

That is a sweeping statement of preemption, and, as the plaintiffs point out here, it is based on a history of increasingly sweeping statements in the statutes relating to firearms by our Legislature.

Each time our courts have found that there is some ability for a local regulation, this statute has gotten stronger, and this is the strongest statement yet. It is hard to think of a more expressed statement of complete preemption.

The response that the City makes to this is, well, we can still pass rules because those aren't the same things as laws and ordinances relating to firearms, and so we can escape the limitation on us that is presented in 9.41.290 by doing something that is not a law or an ordinance that relates to firearms.

The City relies primarily on three cases, and I am going to deal with them briefly in turn and hopefully in chronological order.

The oldest case that the City looks to is State ex rel. Tubs versus City of Spokane at 53 Wn.2d 35, decided in 1958. This was actually not anything to do with firearms. This case had to do with the City council's ability to refuse to rent a coliseum for the use of an amateur hockey team for a specified number of

days. And what the court said was the not surprising information that the City Council was vested with discretion in the management of the city auditorium when it acts in its proprietary capacity which is what it is doing when it rents out an auditorium. The court quoted a treatise on municipal corporations that said that "The power to lease or rent public halls and auditoriums, even when it is not expressly conferred can be implied," and that given the fact that the City Council gave a full hearing and otherwise followed due process that there was nothing unreasonable about the City Council limiting the use of its auditorium, they said, "A much more plausible case of abuse would appear if the council were to allow hockey teams to monopolize the use of the auditorium thereby depriving the public of the privilege of viewing other sports and entertainment which it justifiably anticipated in joining in the bond issue for the construction of the auditorium was approved."

Besides not dealing with firearms, that case also deals with the ability to choose not to lease exclusively to a particular sort of activity for a particular city location, and I just do not see how that case is in play here when we are dealing with the right of citizens to go into parks carrying their

lawfully-owned weapons.

There is no issue here about leasing or use of any leased facility. For example, we do not have a situation where people who own firearms are demanding to go stand around at the community centers and use them exclusively and the City is saying, no, we want to share the community centers with other people, too, which is what I think, really, that case goes to.

The second case presented to me is Cherry versus Seattle, decided at 116 Wn.2d 794 and decided in 1991. This is a case where the City of Seattle was specifically regulating its employees from possessing concealed weapons while on duty or on Metro property and whether that limitation was in conflict with the preemption language of 9.41.290.

What the court said there is that the Legislature was not looking in its preemption language to interfere with public employees in establishing workplace rules, and that where there were simply internal rules for employee conduct that there wasn't any concern about preemption. However, the court added when it deals with 9.41.290 in its application, 9.41.090 refers to, and I am quoting here, "Laws of application to the general public, not internal rules for employee conduct."

There is an unpublished decision by a colleague trial court with whom this court has always had a warm relationship and for whom this court has great respect, which has ruled on a similar case involving the use of firearms at a fire district. And I think that, clearly, under Cherry, that kind of rule for employees is lawful despite the preemption language of 9.41.270 because rules apply to people who work for a fire district or rules apply to people who work for Metro are rules that are for employees, and the City is applying them as an employer. So they are not laws and ordinances. All the rest of us that do not work for Metro or the district do not have to worry about these rules. They don't operate the way laws and ordinances do.

I want to point that out because the court wasn't relying on the way that Seattle had labeled its regulations for Metro employees, and although I have not read the briefing, my bet is that Seattle's regulation, whether called a regulation or rule or something else, with regard to fire direct, was not so important. What was important was that the court was looking at the functionality of Seattle's rule. And saying in Cherry that the functionality of applying only to employees is not the same thing as a rule that

applies to the general public, which is a law or an ordinance.

Let me turn then to the last case that has been at issue here, the Supreme Court's more recent decision in 2006 in Pacific Northwest Shooting Park Association versus City of Sequim. In this case, Sequim was dealing with the sweep of its own permit for the operation of a gun show at its convention center. There had been an application for a temporary use permit to hold a gun show at the convention center, and the Sequim Fire District and police deputy, among other, indicated that they were going to impose some conditions on the operation of the gun show under the permit that the plaintiff was seeking in that case.

Again, we have a couple of things going on that are of interest here. The first is that, as the Supreme Court said, it is certainly arguable that under the statute itself that cities and towns and municipalities do have authority to regulate and restrict firearm possession in the stadiums and the convention centers that they operate, and the court looks specifically to the language of 9.41.300, which we have talked about today in this ruling and, specifically, I think looked to language of subsection (3)(a) and (b) indicating that cities and towns and

counties have the authority to regulate businesses selling firearms.

So the first ruling from the court was that the statute itself provided authority to go ahead and regulate possession of firearms and that what the plaintiff was doing in terms of running his gun show didn't qualify as an exception under any of the language of the statute.

The court's alternate holding was that there was not preemption under Cherry, and specifically what the court said was, "Cherry supports the general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply," and the court went on to explain, "A municipality acts in a proprietary capacity when it acts as the proprietor of a business enterprise for the private advantage of the municipality, and it may exercise its business powers in much the same way as a business, individual, or corporation." And then the court explained, "By issuing a temporary use permit, the City was leasing its property to KNSPA," the plaintiff that was trying to operate the gun show, "and acting in its private capacity as a property owner."

Okay. We are talking about the City issuing

a permit for money to operate a gun show on its premises in a convention center. No discussion is before me in this case about permitting anybody in a proprietary capacity to enter Seattle parks carrying a lawful weapon. If I were to accept the City's argument that every time it deals with property which it manages and controls, that it is acting in a proprietary capacity, there would not be any place that the City didn't have that power over. We would wash away the preemption language entirely. Nothing would prevent the City from preventing people from being on the street with their firearms, being on the waterway with their firearms, being on any part of a park with their firearms, or being in any other place that the City of Seattle has control over.

So, I do not believe that anything about this particular language sweeps as widely as the City has argued, and I am drawing that conclusion because it seems to me important to track what the court was saying when it says that there is something special about acting in a proprietary capacity.

To me, this is right in line with the court saying you can decide not to make your auditorium exclusively available to one kind of enterprise. You can decide that your employees have to follow your

rules. You can decide that when you are issuing a permit as a proprietor of a business, you can control the conditions under which you issue the permit. That is all very much the City's operation as any employer or any private proprietor. But, what I am dealing with here is something much broader.

This rule applies to every citizen that wants to go onto a city park with a concealed weapon. At least that is the way the rule is being applied, according to the plaintiffs and their experience in this case. And, even as worded, it is of general application to anyplace where children and you are likely to be present and signage has been posted.

What the court said, again, in Sequim is, "Although a municipal property owner, like a private property owner, can impose conditions related to firearms for the use of its property to protect its property interests," like its permitting interest, they say, "The critical point is that the conditions the City imposed related to a permit for private use of its property. They were not laws or regulations of application to the general public." That is a stark difference.

Now, that is the legal background here. I have a unique situation where the City has reached out

to apply what it calls a rule to the general public in a way that applies to all members of the general public. And that is why this particular court found the attorney general's opinion persuasive. Frankly, the way the attorney general the statutes and the case law here is very much the way this court reads the statutes and the case law.

I know the attorney general is a republican, I know that Mayor Nickels was a democrat, and I know that Mayor McGinn is a democrat, I do not think it matters. I think we are dealing with issues of how we look at the law fairly, how we construe the language of the statutes, and how we construe the language of the cases, and I do not think there is a lot of construction for this court to make here. This is a sweeping preemption statement in the statute. There is careful language in the Supreme Court cases that I've talked about limiting the application of those cases to situations where the City's acting as an employer or as a private proprietor of its buildings. And, against all of this, we have a background of what appears to be both a federally- and a state-protected constitutional right.

I must say that I think that it is clear that this rule is preempted by the Washington state statute

and that only the Legislature has the power to pass the kind of regulation that the City has attempted to implement in this case.

I also think that the standards for an injunction are met in this case. And let me return briefly to those standards if I could.

First, there has to be a clear, legal, or equitable right. I think I have said enough so far to say that seems obvious to me that the plaintiffs have clear legal rights under Washington state law and under, in all likelihood, both state and federal constitutional provisions.

Second, there is no question about a well-ground fear of immediate invasion of that right. Every plaintiff here has lawfully attempted to bring their firearm onto a city park premises and every one of them has been warned off the premises, and they have documented those fact.

I have to say that, in terms of the ability to exercise the plaintiffs' lawful rights that the acts complained of, i.e. the enforcement of this rule, particularly the broad enforcement of this rule, even beyond the express terms of the rule, are resulting and have resulted in actual and substantial injury to the plaintiffs in the exercise of their rights.

So I am granting the injunction as well.

I am granting summary judgment to the plaintiffs. I am granting injunction.

The one limitation here is that, to the extent that the City has to the organizational plaintiffs having standing where there are already individual plaintiffs in this case, I sustain that objection. And so I am ruling in favor of the individual plaintiffs here. The organizational plaintiffs only to the extent they have no individual member who is already present in this litigation.

And that is the ruling of the court. Give me an order, if you would. I know you all know you have a very complete record from my court reporter. Please go ahead and order it from her, and she will produce it for you as soon as she can.

Thanks, everybody.

(Whereupon proceedings concluded.)

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REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) SS:
COUNTY OF KING)

I, CYNTHIA A. KENNEDY, an official reporter of the State of Washington, was appointed an official court reporter in the Superior Court of the State of Washington, County of King, on April 17, 2006, do hereby certify that the foregoing proceedings were reported by me in stenotype at the time and place herein set forth and were thereafter transcribed by computer-aided transcription under my supervision and that the same is a true and correct transcription of my stenotype notes so taken.

I further certify that I am not employed by, related to, nor of counsel for any of the parties named herein, nor otherwise interested in the outcome of this action.

Dated: _____

_____
OFFICIAL COURT REPORTER

EXHIBIT F

THE HONORABLE CATHERINE SHAFFER

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WINNIE CHAN, et al.,

Plaintiffs,

v.

CITY OF SEATTLE, et al.,

Defendants.

No. 09-2-39574-8 SEA

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

~~[PROPOSED]~~

THIS MATTER is before the Court on Plaintiffs' Motion for Summary Judgment. The Court has reviewed:

1. Plaintiffs' Motion for Summary Judgment,
2. Declarations submitted in support of Plaintiffs' Motion for Summary Judgment, with exhibits,
3. Defendants' Response to Plaintiffs' Motion for Summary Judgment,
5. Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment,
6. _____,
7. _____, and
8. the records and files herein,

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and has considered the arguments of counsel. The Court finds that there is no genuine issue of material fact on which reasonable minds could differ. Further, the Court concludes that, pursuant to RCW 9.41.290, the City of Seattle's authority to regulate the possession of firearms in City parks and recreation facilities during public use of those facilities is preempted by state law, and therefore Seattle's Department of Parks and Recreation's Rule/Policy Number P 060-8.14 ("Firearms Rule") violates Washington law and, on that basis, is null and void. Plaintiffs are entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED,

2. The City of Seattle's Firearms Rule is declared null and void,

3. The City of Seattle is permanently enjoined from enforcing the Firearms Rule in any way. [Rider A attached.]

4. The City is further ordered to immediately remove all signage posted pursuant to the Firearms Rule, within 30 days from the date of this Order.

Dated this 12th day of FEBRUARY, 2010.

[Rider B Attached.]

THE HONORABLE CATHERINE SHAFFER

Presented by:

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

Steven W. Fogg, WSBA No. 23528
Molly A. Malouf, WSBA No. 31972

Approved as to form; notice of presentation waived:

[Counsel for Plaintiffs]

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DDD SMF

RIDER A:

The Court finds that:

1. Plaintiffs have a clear legal or equitable right to carry firearms under federal and state constitutions.

2. Plaintiffs have established a well-grounded fear of invasion of that right.

3. Plaintiffs have established that they have sustained a substantial injury.

DDD SMF

RIDER B:

5. The Court finds that the Organizational Plaintiffs lack standing to bring claims, and their claims are dismissed with prejudice.